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Wading into MONTANA WATER RIGHTS

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FOREWORD

Man has been transfixed by water since the beginning of time.

> "They are like trees planted by streams of water, bearing fruit in due season, with leaves that do not wither; everything they do shall prosper." *Psalm 1, Verse 3.*
>
> "They feast upon the abundance of your house; you give them drink from the river of your delights." *Psalm 36, Verse 8.*

In Montana, the yearning for water and abundant crops is no less real, and no less rooted in our history. The dry land farmer in eastern Montana looks westward with a touch of envy at a counterpart in the western part of the state who seems to have more than an adequate supply of irrigation water. The irrigator looks westward hoping for more rain and more water. It is perhaps the nature of farmers that there is never enough water. But beyond our yearnings, there is a real sense of urgency among water users as the 20th century comes to a close.

Growing cities and towns plan anxiously for more water. Fertile farm lands fall under the subdivider's survey. Water rights are divided over and over among "ranchettes" until little beneficial use results, more controversy arises, and the distribution becomes exceedingly difficult. Down stream states and users eye the clear waters of Montana and plan for its use. The Montana effort at readjudication, begun in the 1970's, drags on through the 1990's. Chief Water Judge W.W. Lessley's self-imposed deadline to complete the project in ten years has long since passed as has the judge himself.

It is time for Montanans, water users and citizens at large, to arm themselves with a historical perspective and basic knowledge of our water laws and procedures. No one is more qualified to help us with that task than Professor Gerald L. Westesen, of Montana State University-Bozeman, and his insightful co-writer, Michelle Bryan. In this deceptively short and concise analysis of Montana Water Law, the reader is taken into the mining camps of Montana Territory, to the halls of our early legislatures, and into the chambers of the Montana Supreme Court. We ponder the outcome of the readjudication movement. We see Montana water law evolve as a living, breathing thing that is uniquely our own.

I commend **Wading into Montana Water Rights** to the reader. It is my hope that this unassuming, but accurate and readable document will help Montanans to guide and direct the development of Montana water law into the next century.

Thomas A. Olson
District Judge, Bozeman, Montana.

A primer for the citizen, this manual addresses commonly asked policy questions regarding water rights. Explanations attempt to relay principles in understandable terms. In the simplification process, some technical nuances may be lost. For the legally curious, we recommend direct reference to cited laws and state agencies.

MONTANA WATER RIGHTS

Few elements reach so deeply into the human existence as water. Our economic endeavors, recreational excursions, and very well being depend on the quality and abundance of this resource. Yet, which persons can use water? In what amount? At what time? Such questions lead us into the realm of water rights — a blend of laws, regulations, and traditions that govern the distribution of Montana's water among its many users.

WHO OWNS MONTANA WATERS?

Montana waters, in all their varied forms and locations, belong to the state. This ownership, however, exists on behalf of all state citizens. The **Montana Constitution** explains that:

> *[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people* . . . (Article IX, Section 3(3)) (emphasis added).

WHAT IS A "WATER RIGHT"?

Since Montana waters belong to the state, water rights holders ***do not own*** the water itself. Instead, they possess a ***right to use*** the water, within state guidelines. Accordingly, Montana law notes:

> *[a] "water right" means the right to use water* . . . (**MCA** § 85-2-422) (emphasis added).

•• WATER RIGHTS DOCTRINES ••

Because of the assorted geographic, economic, and social landscapes spanning our nation, each state water rights system is unique. Certainly, every state has a "right to use" water right; however, doctrines for implementing such water rights vary. Nationwide, three overarching doctrines exist:

- riparian,
- prior appropriation, and
- hybrid.

RIPARIAN DOCTRINE

Drawing upon European laws and colonial experiences, the **riparian** doctrine evolved as our nation's first water rights system. Variations of this doctrine surface in over half our states — particularly in water-rich regions like the East Coast and Great Lakes.

Fundamentally, this doctrine attaches water rights to property: landowners bordering a **watercourse** have the right to use adjacent waters. Essential elements of a riparian right include:

- contiguity to a watercourse,
- reasonable use,
- equal access, and
- indefinite quantity.

Contiguity to a Watercourse. To earn a "riparian" classification and accompanying water rights, property must be **contiguous** to a watercourse. If property is "non-riparian," no water rights are available.

Reasonable Use. To exercise a water right, the use must be **reasonable**. Depending on the watercourse in question, "reasonable" may carry differing meanings. Typically, the definition considers:

- suitability to the watercourse,
- economic value,
- social value, and
- impacts on other users in the watercourse.

Equal Access. Regardless of starting date, amount, or type of use, no water right has priority over another. In fact, an unused water right is as **valid** as a used one. Subsequently, one owner's reasonable use cannot interfere with the uses of other riparians. During drought periods, this equality also requires users to share the burden of water shortages.

Indefinite Quantity. The quantity of a riparian right is indefinite, fluctuating according to available supply. During high water years, users have equal access to a greater quantity; in drier times, each must use less. Whatever the available supply, one riparian cannot consume a quantity that unreasonably diminishes another riparian's use.

Permit Requirement

Responding to increased population and development demands, riparian states have integrated **permit** requirements into their doctrines. Now, besides ownership of riparian land, an individual must also obtain state approval before utilizing a water right. Designed to safeguard public water supplies, the permit process may limit private riparian rights in heavily used watercourses.

PRIOR APPROPRIATION DOCTRINE

A product of westward expansion, the prior **appropriation** doctrine emerged as the next major water rights system. Native to the arid West, the doctrine prevails in nine states, including Montana.

Born in nineteenth century mining camps, prior appropriation follows a "first in time, first in right" philosophy. Essentially, this doctrine connects water rights to usage, with earlier users holding superior rights over later users. Traditional components of an appropriation are:

- intent,
- diversion,
- beneficial use,
- priority access, and
- definite quantity.

Intent. Intent is the first step in a valid appropriation. A water right does not exist simply because water strays across a parcel of land. An appropriator must ***intend to use*** the water. Today intent is proved by:

- applying for a permit, and
- beginning diversion preparations.

Diversion. Prior appropriation extends to riparian and non-riparian lands alike. A landowner may utilize water from a noncontiguous watercourse — even another **watershed**. Therefore, except for instream beneficial use discussed on page 33, the next step in an appropriation is **diversion**. Whether a simple rock wall or a grandiose pumping plant, a diversion must conduct water from its natural channel to the area of use.

Beneficial Use. Finally, to **perfect** an appropriation, **beneficial use** must occur. Usage is so critical, in fact, that a state may terminate an unused water right. Which uses constitute "beneficial" vary with the economic and social priorities of each state. Nonetheless, common beneficial uses include:

- domestic/municipal,
- agricultural,
- industrial,
- recreational, and
- fish/wildlife.

Priority Access. Once put to beneficial use, the water right receives a **priority date** — generally the date of established intent. Priority dates determine the seniority of users on a watercourse. The first user is a **senior appropriator**, earning the earliest priority date and first dibs on water use. Subsequent users are **junior appropriators**, exercising their water rights in descending order of priority. During drought periods, senior appropriators may ***completely*** fulfill their water rights, leaving the burden of shortage on junior appropriators.

Definite Quantity. The quantity of an appropriation right is fixed and definite. Determined during initial appropriation, a water right's precise quantity depends on:

- the quantity of water available in the watercourse,
- the quantity of water needed for the beneficial use, and
- the carrying capacity of the diversion.

Diversions cannot exceed established quantities, and must occur in order of priority. Thus, in high water years, all users will likely get their full quantities. Unfortunately, in drier times, junior appropriators may receive little or none.

Permit Requirement

Like riparian regions, prior appropriation states have incorporated permit requirements into their traditional systems. Now, besides intent → diversion → beneficial use, state permission is necessary to perfect a water right. Enhancing record keeping and public participation, the permit process defines and documents each use on a watercourse.

HYBRID DOCTRINES

While some states chose prior appropriation over the riparian doctrine, others mixed the two, creating **hybrid** doctrines. Dubbed "California" doctrines (after the first hybrid state), these blended systems appear in ten states — interspersed from the Pacific Coast to the Mississippi River.

Initially, most hybrid states embraced the riparian doctrine, assimilating prior appropriation later. Beyond this common heritage, no two hybrid systems are alike. To accommodate distinct regional needs, each state has fashioned its own mixture of allowable uses, access, and permitting.

DOCTRINE	ORIGIN	CLIMATE	USE	ACCESS
Riparian	European law; colonial experiences	water-rich	reasonable	equality among users
Prior Appropriation	mining practices	arid	beneficial	seniority among users
Hybrid	varies by state	varies by state	varies by state	varies by state

WHERE DO MONTANA WATER RIGHTS ORIGINATE?

TRADITIONS

During the mid-nineteenth century, a young Montana territory searched for its own water rights doctrine. While the East offered its riparian **precedent**, local miners contributed an appropriation perspective, and folks from California brought notions of a hybrid approach.

A Way of Life

In the mining camps, appropriation thrived. Extractive processes often demanded large quantities of water. Since **diggings** were commonly on non-riparian land, diversion was essential. The first miner at a diggings collected a senior water right, quantified in **miner's inches**. Remaining stream flow was then available for later (junior) arrivals. Miners perfected their water rights by:

- posting notice at the point of diversion, and
- applying water to a beneficial use.

Although the miners' use of water was transitory, their appropriation philosophy endured. Incoming farmers and ranchers coopted the priority system, applying it to irrigation and stock watering.

A Matter of Policy

Meanwhile, the First Territorial Legislature was established in the mining community of Bannack. By January of 1865, the assembly adopted its first set of laws: the Bannack Statutes. Essentially, the statutes recognized English **common law** — including its ***riparian doctrine*** — as the territory standard.

Clearly, when it came to Montana water rights, differences of opinion existed. Were the miners on target, or did government have more insight? Amid ambiguity, the populace continued using water, waiting for a coherent doctrine to form.

NATIONAL DEVELOPMENTS

At the federal level, Congress was busy assimilating a young appropriation doctrine into a historically riparian world. Legislation like the 1877 Desert Land Act, 1886 Mining Act, and 1870 Placer Act validated the unique dynamics of western water use. In 1902, the Reclamation Act dedicated federal funds to large-scale water storage projects, enhancing appropriation opportunities.

The U.S. Supreme Court, on several occasions, reviewed the validity of priority systems. Their decisions affirmed prior appropriation's role in the West. In *Clarke v. Nash* (1905), for example, the court noted:

> *[Water rights] are not the same in the arid and mountainous states of the west that they are in the states of the east . . . because of the totally different circumstances in which their inhabitants are placed . . . . This court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated* (198 **U.S.** 361, 370).

STATE DEVELOPMENTS

Montana achieved statehood in 1889. Though prior appropriation was increasingly the norm, riparian doctrine still lingered in the statutes. Settlement advanced and water uses overlapped, creating disputes that inevitably surfaced in the courts.

As courts began ruling on water rights issues, judicial support for prior appropriation prevailed. In *Mettler v. Ames Realty Co.* (1921), the Montana Supreme Court closed the books on riparian rights. Landowner Anna E. Mettler — in traditional riparian manner — used adjacent waters from Prickly Pear Creek for domestic and livestock purposes. Ames Realty possessed a documented prior appropriation on the same watercourse. When the company built a diversion upstream from Ms. Mettler, she was left without her accustomed water. She sued, claiming a riparian right. The court disagreed, holding:

> *[The doctrine of appropriation was born of the necessities of this state and its people. . . . Our conclusion is that the common-law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack Statutes in 1865; . . . [and] that it is unsuited to the conditions here . . . .* (61 **Mont.** 152, 170-171) (emphasis added).

Inconsistencies

Despite widespread state endorsement of prior appropriation, Montana still lacked a standardized means of regulating water rights. Foremost, the differing ***types*** of water rights needed resolving.

Use Rights. Unlike miners who posted notices at diversions, many farmers and ranchers simply applied water to beneficial use. Lacking a public display of intent, these undocumented appropriations became "use rights."

Notice Rights. In contrast, other appropriators posted notice, but never diverted the water for beneficial use. These documented ***but unused*** rights were "notice rights" or "paper rights," are not actually water rights. Rather they are a class of imperfected water rights.

Filed Rights. Responding to these inconsistencies, 1885 legislation outlined a statewide reporting system where an appropriator:

- posted a notice at the point of diversion, and
- filed a copy of the notice at the county courthouse.

Water rights acquired under this process were "filed rights." Unfortunately, this system was ***optional***, and many users continued developing rights without state notification or supervision.

Disputes

A lack of reporting and supervision resulted in overappropriated watercourses. On the West Gallatin River, for example, appropriations totaled 315,456 miner's inches when average river flow was 56,125 miner's inches! With water use exceeding supply, **litigation** escalated.

Water disputes were risky ventures, starting with the price tag. In 1909, estimated legal costs on the West Gallatin River were $60,000. Additionally, no mechanism existed for including **interested persons** in the process. Moreover, once a court **decreed** the disputed rights, the state could not adequately enforce them.

Constitutional Convention

The water rights process — with all its discrepancies and conflicts — was a major topic at the 1972 Montana Constitutional Convention. Policymakers recognized the overwhelming need for improved record keeping and regulation. First, the Convention incorporated all past water rights into the new **Montana Constitution**:

> *all existing [water] rights . . . are hereby recognized and confirmed* (Article IX, Section 3(1)).

Existing rights included ***any right*** originating on or before July 1, 1973. Whether a use right, decreed right, or filed right, each was now equally valid. By recognizing all rights, the state upheld the prior appropriation doctrine and over a hundred years of precedent.

To strengthen state supervision, the Convention next charged the Montana Legislature with providing:

> *the administration, control, and regulation of water rights and . . . a system of centralized records* (Article IX, Section 3(4)).

The legislature responded with the **Montana Water Use Act** (WUA) (MCA § 85-2-101 et seq.).

WATER USE ACT

WHAT CHANGES DID THE WATER USE ACT CREATE?

Passage of the **Montana Water Use Act** (WUA) was the most sweeping water rights reform in state history. Effective July 1, 1973, the legislation made several significant changes:

- all ***existing*** water rights must undergo adjudication in state court;
- all ***new or changed*** water rights must undergo a permit process;
- all water rights must be filed in the state centralized records system;
- all water rights must be measured in cubic feet per second (cfs); and
- future-use or instream flow rights are possible through the water reservation system.

Adjudication Process. Although water rights litigation was prevalent before the WUA, decrees were typically limited to specific river segments. To remedy this sporadic coverage, the legislature ordered statewide **adjudication** (MCA § 85-2-211-243). Essentially, this court process prioritizes and quantifies all ***existing*** rights in each Montana **basin**. With eighty-five basins in Montana, and thousands of **claims** per basin, state adjudication is a massive undertaking that will stretch well into the 21st century.

Permit Process. To protect existing rights and better monitor future appropriations, the WUA created a permit system (MCA § 85-2-301-343). The traditional intent → diversion → beneficial use requirements is no longer enough to earn a valid water right. Individuals seeking ***new or changed*** rights must also get state consent, in the form of a permit or change authorization.

Centralized Records. Before 1973, appropriators had the ***option*** of recording water rights at their county courthouses. With the creation of the centralized records system in Helena, filing with the state became ***mandatory*** (MCA § 85-2-112(3)). As adjudication progresses, this system will eventually contain all Montana water rights.

Measurement. Historically, many appropriators calculated **flow rate** in miner's inches. Upon passage of the WUA, the **cubic foot per second** (cfs) became the standard measurement for flow rate in Montana (MCA § 85-2-103). Additionally, the **acre-foot** expresses water **volume**.

Flow Rate	1 cfs = 7.48 gallons per second, 448.80 gallons per minute, 40.00 miner's inches
Volume	1 acre-foot = 325,851 gallons, 43,560 cubic feet

Water Reservations. With reliable public water supplies in mind, the WUA also created a method for government entities to make **water reservations** for:

- existing or future beneficial uses;
- to maintain minimum stream flows; or
- to maintain **water quality** (MCA § 85-2-312(1)).

WHO ADMINISTERS THE WATER USE ACT?

Three state entities play a role in administering Montana water rights:

- Department of Natural Resources and Conservation (DNRC),
- Montana Water Court, and
- Environmental Quality Council.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

Foremost, the DNRC administers the permit system for waters appropriated ***after*** July 1, 1973. From application forms to procedural rules and hearings, DNRC coordinates each phase of the process. Additionally, the DNRC:

- maintains the central records system in Helena;
- trains water commissioners and mediators;
- provides assistance to the public; and
- provides technical information and assistance to the Water Court (MCA § 85-2-112-114).

MONTANA WATER COURT

All adjudication of ***existing*** water rights occurs under the jurisdiction of the Montana Water Court and its divisions (MCA § 3-7-101-502). Additionally, the court may rule on other legal water issues forwarded by the DNRC.

ENVIRONMENTAL QUALITY COUNCIL

The Environmental Quality Council contributes policy **oversight** to the administration of state water rights. Among its roles, the council:

- advises and updates the legislature on water rights developments;
- oversees policies of the DNRC and other institutions who deal with state water; and
- communicates with the public on matters of water policy (MCA § 85-2-105).

THE ADJUDICATION PROCESS

Adjudication of the Powder River Basin was Montana's first venture into organizing existing water rights. Initiated in 1973, the burden of collecting and investigating claims fell to the Department of Natural Resources and Conservation (DNRC). Investigations often involved on-site visits, aerial photo interpretations, and interviews. In 1979, despite six years of intensive field work, completion of the first basin was distant. Decidedly, to adjudicate its remaining eighty-four basins in a ***timely manner***, Montana needed a more efficient system.

Consequently, the 1979 legislature passed Senate Bill 76 (SB 76), amending portions of the **Water Use Act** (WUA). Renovations included:

- dividing the state into four water divisions;
- within each division, establishing a water judge position;
- establishing a chief water judge position for the state;
- establishing the Reserved Water Rights Compact Commission (RWRCC) to negotiate the claims of federal entities and Indian tribes;
- setting a filing deadline for all existing water rights claims; and
- exempting stock water and domestic claims from the adjudication filing requirement.

WHO ADMINISTERS ADJUDICATION?

MONTANA WATER COURT

SB 76 divided the Montana Water Court into four water divisions, according to the geographical drainages of the state:

- the Lower Missouri River,
- the Upper Missouri River,
- the Yellowstone River, and
- the Clark Fork River (MCA § 3-7-101-102).

Water Judges

Division Judges. Within each division, a water judge presides, appointing **water masters** to assist in the adjudication process. A water judge must be a **district** judge (current or retired) from a district within the water division (MCA § 3-7-201, 301). Water judges cannot examine water claims occurring beyond the boundaries of their divisions (MCA § 3-7-501).

Chief Water Judge. The chief justice of the Montana Supreme Court appoints a chief water judge to supervise all division water judges and guide statewide adjudication. Ultimately, the Montana Supreme Court monitors all water judges, water masters, and Water Court personnel (MCA § 3-7-204, 221).

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

The DNRC and its regional offices assist the Water Court throughout adjudication by:

- providing information and technical support to the water judges;
- providing information and technical support to persons filing claims; and
- upon the request of a water judge, conducting field investigations of claims (MCA § 85-2-243(1)).

RESERVED WATER RIGHTS COMPACT COMMISSION

Unique circumstances arise when federal entities and/or Indian tribes assert federal **reserved** water claims in a basin. (See the discussion on page 30 regarding federal reserved water rights for more on this issue.) In conjunction with general adjudication, Montana may form a **compact** with the entity or tribe. In such cases, the RWRCC negotiates on behalf of the governor (MCA § 85-2-701).

HOW IS THE ORDER OF ADJUDICATION DETERMINED?

Each **biennium**, the Montana Legislature gives priority to specific basins within each water division. The water judges and DNRC conduct adjudication according to this prioritization. With 100 or more signatures, claimants may also petition the water judge to designate a priority basin (MCA § 85-2-217(2)). To receive priority in adjudication, a basin must involve:

- recurring water shortages resulting in urgent water rights controversies;
- federal or Indian water rights negotiations nearing completion; and/or
- adjudication proceedings nearing issuance of a decree (MCA § 85-2-217(1)).

HOW DOES ADJUDICATION WORK?

CLAIMS

In 1979, the Montana Supreme Court issued a "Water Rights Order," requiring all persons claiming existing water rights to file with the DNRC by January 1, 1982. Failure to file by the deadline would result in presumption of **abandonment** of the right (MCA § 85-2-212). Later, the court extended the filing deadline to April 30, 1982. DNRC received more than 200,000 claims by this closing date.

Public Notice. To assure all **claimants** knew of adjudication requirements, the court dispersed its "Water Rights Order" through:

- printings in state newspapers,
- mailings with property taxes, and
- notices in county courthouses and DNRC field offices (MCA § 85-2-213).

Exemptions. The court **exempted** all claim requirements for: (1) stock water or (2) individual domestic use. However, users could ***voluntarily*** file claims to establish a record of use (MCA § 85-2-222).

Criteria. Each statement of claim had to include:

- name and address of the claimant;
- name of watercourse from which a right was claimed;
- quantities and times of claimed water use;
- description of point of diversion and place of claimed water use;
- purpose of use;
- approximate starting date of beneficial use; and
- supporting evidence such as maps, plats, aerial photos, or decrees (MCA § 85-2-224).

Late Claims. Although the "Water Rights Order" stated unfiled claims were abandoned, the 1993 legislature passed a law authorizing late claims through July 1, 1996. Around 4,500 late claims were filed before the 1996 closing date. All remaining unclaimed rights are permanently **forfeited** (MCA § 85-2-213(3)). The Water Court allows ***authorized*** late claims, but places them subordinate to:

- federal and Indian compacts with Montana,
- timely filed claims, and even
- some newly permitted rights (MCA § 85-2-221(3)).

DECREES

A decree is the final product of a basin adjudication. To reach completion, a decree progresses through several stages: examination → temporary preliminary/preliminary decree → public notice → hearings → and final decree.

Examination

Before the Water Court evaluates a basin, DNRC staff must verify that each claim is complete, accurate, and reasonable. If an examination uncovers excessive claims or other discrepancies, DNRC contacts the claimant to resolve any errors. After examining ***all*** claims in a basin, DNRC issues a "Summary Report" to the water judge, who uses the information in composing the basin decree.

Temporary Preliminary Decree

When basin adjudication involves reserved water rights negotiations, the process can become complex. Thus, a water judge may issue a temporary preliminary decree defining all claimed rights ***except*** reserved ones. Once a compact concludes, the judge incorporates it into a preliminary decree (MCA § 85-2-231(1), (4)).

Preliminary Decree

In basins with either: (1) no reserved rights claims or (2) concluded compacts, the Water Court issues a preliminary decree based on:

- statements of claim,
- the DNRC "Summary Report," and
- if applicable, reserved water rights compacts (MCA § 85-2-231(2)).

Public Notice

Upon issuing a temporary preliminary or preliminary decree, the court must notify all affected claimants. This notification consists of direct mailings and publication in area newspapers (MCA § 85-2-232(1), (3)). All water rights holders are responsible for verifying the accuracy of their decreed rights.

Hearings

Persons disagreeing with a decree have 180 days to file an objection. Accordingly, the division judge will hold a hearing to reevaluate all disputed areas. Any of the following parties may object:

- DNRC,
- any person named in the decree, or
- any interested person (MCA § 85-2-233(1)-(2)).

Final Decree

After resolving all objections, the water judge issues a final decree. If no objections arise, the preliminary decree automatically becomes final (MCA § 85-2-234(1)). Because the judge adjusts existing rights according to the overall needs of a basin, the quantity of a decreed water right may differ from the original claim. For each water rights holder, the decree states:

- flow rate,
- priority date,
- beneficial use,
- time and place of use,
- source of water, and
- place and means of diversion (MCA § 85-2-234(6)).

In turn, DNRC issues a "Certificate of Water Right" to each decreed rights holder, filing a copy in the Department's centralized records system (MCA § 85-2-236).

STAGE OF ADJUDICATION (as of publication date)	NUMBER OF MONTANA BASINS
Pending Examination	12
Examination	16
Temporary Preliminary Decree	37
Preliminary Decree	7
Final Decree	6

THE PERMIT PROCESS

Before 1973, appropriations were often inconsistent and unreported. With passage of the **Water Use Act** (WUA), however, the permit process became the ***exclusive*** route to acquiring and documenting new water rights.

WHO ADMINISTERS THE PERMIT PROCESS?

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

The Department of Natural Resources and Conservation (DNRC) is the primary administrative body of the permit process. Among its roles, the Department:

- adopts rules and procedures for permit applications;
- reviews applications;
- conducts hearings;
- provides technical assistance to applicants;
- grants, modifies, or denies permits; and
- documents all permits in the centralized records system (MCA § 85-2-112-113).

MONTANA WATER COURT

In the permit process, DNRC may refer legal issues regarding existing water rights to the Montana Water Court. In such circumstances, the court reaches a determination and **remands** the matter back to the Department for further processing (MCA § 85-2-309(2)).

WHEN IS A PERMIT REQUIRED?

Depending on the source and quantity of a new appropriation, permit requirements vary. Generally, all persons must obtain permission from the DNRC ***before*** diverting, **impounding**, withdrawing, or distributing state waters. This requirement applies to:

- **surface water** use, or
- **ground water** use exceeding 35 gallons per minute (gpm) or 10 acre-feet/year (MCA § 85-2-302).

Limitations. When an anticipated ground water use exceeds 3,000 acre-feet/year, the appropriation requires special legislative approval (MCA § 85-2-317).

Exemptions. Certain livestock reservoirs or pits located on **nonperennial streams** do not require ***prior*** DNRC approval. This exception also applies to developed wells or springs using less than 35 gpm or 10 acre-feet/year. With any exemption, nonetheless, an appropriator must notify DNRC within sixty days ***after*** water use begins (MCA § 85-2-302).

HOW DOES THE PERMIT PROCESS WORK?

To obtain a "Permit to Appropriate Water," a prospective water user must progress through several steps: application ➜ application review ➜ notice of completion ➜ and certificate of water right.

APPLICATION

The first step is filing an "Application for Beneficial Water Use" (Form 600) with DNRC. Besides describing the particulars of the proposed appropriation — intended use, location, quantity — the applicant must prove with a **preponderance of evidence** that:

- water is ***physically*** available at the proposed point of diversion;
- water is ***physically*** available in the amount the applicant seeks to appropriate;
- based on DNRC records, water is ***legally*** available during the period the applicant seeks to appropriate;
- the water rights of prior appropriators will not be **adversely** affected;
- the proposed means of diversion, construction, and operation are adequate;
- the proposed use is a beneficial use;
- the applicant owns or has permission to use the property at the place of use. (MCA § 85-2-311(1))

If a valid objection is raised regarding water quality, the applicant may also have to prove:

- the water rights and water quality of prior appropriators will not be **adversely** affected;
- the proposed use will not substantially change the quality of the water supply;
- the ability of a **discharge permit** holder to satisfy **effluent** limitations will not be adversely affected (MCA § 85-2-311(1)).

To satisfy these criteria, persons must submit hydrologic evidence such as water supply data, photographs, or field reports (MCA § 85-2-311(5)). Information gathering can be complex and time consuming. Most small streams, for example, have no stream flow records. Often, applicants must enlist the aid of engineers and policy experts.

A good starting point is one of DNRC's eight regional field offices. Department staff can suggest information sources, discuss the chances of getting a new right, and gauge whether a priority date will yield enough water in dry years to justify development.

APPLICATION REVIEW

After receiving an application and supporting evidence, DNRC reviews the materials for completeness and accuracy. If anything is incomplete or incorrect, the Department returns the application for revisions (MCA § 85-2-302). An application's filing date is significant, since it ultimately becomes the ***priority date*** for an approved appropriation (MCA § 85-2-401(2)).

Environmental Review

DNRC also initiates an environmental review, assessing whether the appropriation will significantly harm environmental quality. If a threat exists, the Department commissions an **Environmental Impact Statement** (EIS), incorporating it into the review process (MCA § 85-2-124 and 75-1-201).

Public Notice

If the proposed appropriation carries possible adverse effects, DNRC: (1) mails notification to all potentially affected parties and (2) publishes notice in area newspapers. Interested persons may then file an "Objection to Application" (Form 611) by the established deadline. Alternately, if the application poses ***no*** adverse effects and satisfies ***all*** criteria, DNRC waives public notice and grants a permit (MCA § 85-2-307-308).

Hearings

When DNRC receives a valid objection, the Department holds a public hearing. If any legal issue arises during a hearing, DNRC may refer the issue to the Water Court for determination. After considering evidence, testimony, and Water Court determinations, DNRC issues a proposal to grant, modify, or deny the permit. Each party then has twenty days to file written exceptions to the proposal. The Department then issues a final decision (MCA § 85-2-308-310).

Final Decision

In its final decision, DNRC either grants, modifies, or denies a permit application. To receive a permit in original or modified form, the applicant must satisfy all criteria. Even one unmet criterion — such as failure to document beneficial use — can mean permit denial (MCA § 85-2-310-311).

Permit Terms. The Department often places conditions and limitations on a permit. For example, an appropriator may need to reconstruct a diversion to adequately transport a water right. Most important, a permit specifies a time limit for perfecting a granted right via diversion → beneficial use (MCA § 85-2-312).

Provisional Permit. If DNRC grants a permit in a basin undergoing adjudication of existing rights, the permit is **provisional** and subject to modification by the Water Court's final decree (MCA § 85-2-312).

NOTICE OF COMPLETION

After permit approval, an appropriator must perfect the water right within a specified period. If a permittee does not show **due diligence** in completing permit provisions, DNRC may modify or revoke the water right. Upon building a diversion and beneficially using water, an appropriator must file a "Notice of Completion" (Form 617) with DNRC. The Department, in turn, reviews the notice, and may conduct on-site inspections to ensure **compliance** (MCA § 85-2-314).

CERTIFICATE OF WATER RIGHT

After verifying the completion notice, DNRC issues a "Certificate of Water Right" formally documenting the permit. This certificate carries a priority date ***junior*** to prior permits, water reservations, and existing rights. The Department sends the original certificate to the permittee, filing a duplicate in the centralized records system in Helena (MCA § 85-2-315).

WHAT HAPPENS WHEN A WATER SOURCE REACHES MAXIMUM APPROPRIATION?

As our limited Montana waters face increased demands, many areas have no water available for further appropriation. In cases of maximum appropriation, the state may launch protective monitoring and regulation.

CONTROLLED GROUND WATER AREAS

When excessive use of ground water occurs, DNRC can designate a controlled **ground water area**. Whether initiated by the Department, another government agency, or petition of ground water users, one of the following factors must be present:

- ground water withdrawals are in excess of **recharge**;
- excessive withdrawals are likely to happen in the near future because of increased use;
- significant disputes exist regarding priority and use of rights;
- ground water levels or pressures are in decline;
- excessive withdrawals may cause contamination or decreased water quality; or
- ground water quality is unsuited for a specific beneficial use (MCA § 85-2-506).

Upon designating a controlled area, the DNRC may place conditions on the withdrawal and use of the ground waters. Presently, Montana has six controlled ground water areas.

CLOSED BASINS

When a basin becomes highly appropriated, the state may restrict further appropriation. Whether designated by DNRC rule, state legislation, compact negotiations, or petition of water users, closed basins occur when:

- no remaining unappropriated water supply exists;
- further use will adversely affect the water rights or water quality of prior appropriators (MCA § 85-2-319).

Additionally, the DEQ may petition for a basin closure if it believes that:

- further use will adversely affect the ability of a discharge permit holder to satisfy effluent limitations;
- further use will adversely affect the water rights or water quality of prior appropriators; or
- further use will interfere with the water quality classification of a watercourse (MCA § 85-2-319).

To protect water availability, DNRC denies or strictly limits permit applications on these watercourses. As of the publication date for this document, Montana has 25 closed basins.

WATER USE

Whether exercising a century-old, existing water right or a newly permitted water right, an appropriator must observe standard rules of use. From time of use, to place of use, to type of use, these rules guide the distribution of Montana waters.

HOW ARE WATER RIGHTS DISTRIBUTED?

Priority

In Montana, water rights distribution follows the traditional "first in time, first in right" philosophy. Accordingly, a senior appropriator may ***completely*** fulfill her/his water right before a junior appropriator receives any (MCA § 85-2-401).

Water Commissioners

Each Montana district court supervises water use within its **jurisdiction** (MCA § 85-5-106). In its oversight capacity, a court may appoint one or more water commissioners to measure, record, and distribute water rights on a watercourse. Such appointments result upon:

- petition of water rights holders (owning at least 15 percent of the water rights on a watercourse);
- application by both DNRC and one or more water rights holders on a watercourse; or
- application of the board(s) of one or more **irrigation districts** (MCA § 85-5-101, 107).

Chief Commissioner. When a court appoints two or more water commissioners on a watercourse, one may be designated chief commissioner. A chief commissioner supervises the other commissioner(s) in distributing water rights (MCA § 85-5-102).

Maintenance. Upon petition of water rights holders (owning at least 51 percent of the water rights on a watercourse), the court may direct a commissioner to maintain/repair ditches, canals, and other structures necessary to distribute water rights. Owners are responsible for all maintenance expenses (MCA § 85-5-106).

CAN WATER RIGHTS BE CHANGED?

Over time, appropriators may need to alter some aspect of their water right. An irrigator, for example, might want to move a diversion upstream. All water rights holders must receive DNRC approval ***before*** changing:

- point of diversion,
- place of use,
- purpose of use, and/or
- place of storage (MCA § 85-5-106).

Changing a water right is much like applying for a permit. An appropriator first submits an "Application for Change" (Form 606) to DNRC, proving specific criteria:

- the proposed use will not adversely affect the water rights and water quality of prior appropriators;
- the proposed means of diversion, construction, and operation are adequate;
- the proposed use is a beneficial use;
- the applicant owns or has permission to use the property at the place of use;
- the proposed use will not substantially change the quality of the water supply; and
- the ability of a discharge permit holder to satisfy effluent limitations will not be adversely affected (MCA § 85-2-402(2)).

As in the new permit process discussed on page 19, information regarding water quality is only required if there is a valid objection filed.

After receipt by DNRC, an "Application for Change" undergoes the same steps of public notice → hearings → and notice of completion as the permit process. If DNRC grants a change, the priority date remains identical to the original water right.

Salvaged Water. An appropriator who **salvages** water can beneficially use the leftover water. To apply salvaged water to a ***new*** beneficial use, the water rights holder needs prior DNRC approval (MCA § 85-2-402(2)(e)).

Temporary Change

Through a nearly identical process, an appropriator may ***temporarily*** change a water right. As social and economic conditions change, water users may wish to voluntarily reallocate water use. The temporary change process allows these modifications while protecting other appropriators. After DNRC authorization, a temporary change may last up to ten years, and is renewable for up to ten more (MCA § 85-2-407).

CAN OWNERSHIP OF WATER RIGHTS BE CHANGED?

TRANSFER OF OWNERSHIP

When landowners transfer a property, they may also transfer any water rights associated with the property. Within sixty days of filing the deed, the original owner must submit a "Water Right Transfer Certificate" to DNRC. The Department then updates the centralized record system. The priority date of a transferred water right remains the same as the original right (MCA § 85-2-421-424).

LEASING

The DNRC administers a water leasing program on behalf of the state. An individual may lease water from the state for any beneficial use, but the lessee ***does not*** acquire a water right. The DNRC holds the actual water right. Lease conditions include: (1) a 50,000 acre-feet limit and (2) a fifty-year term limit, renewable up to another fifty years. Lease applicants must satisfy the same criteria as permit applicants (MCA § 85-2-141).

ABANDONMENT

If DNRC believes that an appropriator has abandoned a water right, the DNRC may initiate a court action to declare the right abandoned. Abandonment is the consequence of:

- ceasing to appropriate all or part of a right with the intention of abandonment;
- ceasing to appropriate a right according to its terms and conditions; or
- ceasing to appropriate all or part of a right for a period of ten years when water was available for use (MCA § 85-2-404).

If any of these conditions exist, DNRC may petition the appropriate district court to declare the rights abandoned. The district court conducts a hearing and the Department bears the burden of proving abandonment (MCA § 85-2-406).

DISPUTES AND ENFORCEMENT

As supply and demand increasingly butt heads, disputes arise concerning the use of Montana waters. Perhaps an appropriator takes water out of turn, or diverts excessive amounts. In watercourses with scarce quantity or high appropriation, such actions may lead to controversy.

WHAT HAPPENS WHEN A WATER RIGHTS DISPUTE OCCURS?

The area DNRC field office is a good starting point for resolving water use conflict. Department personnel can access priority date and flow rate information, assess the situation, and recommend appropriate action. Water commissioners are another direct resource. Disputing parties may also consult the district court judge supervising their basin. Seeking advice from an experienced water lawyer is also an alternative.

JUDICIAL APPROACHES

When disagreeing parties cannot amicably reconcile, they may seek court assistance. Depending on the circumstances and basin in question, the judicial process differs.

Before Final Adjudication. In basins that have not completed adjudication, a person may petition the district court for a temporary decision pending the issuance of a final decree (MCA § 85-2-406(2)). Alternately, parties can file objections with the Water Court during the hearing stage of adjudication (MCA § 85-2-233). Ultimately, the judicial conclusions of the final decree will settle many dispute questions.

After Adjudication. In adjudicated basins, persons must take complaints to the district court that issued the final decree. Court decisions cannot alter decreed or permitted rights unless they involve abandonment, waste, or illegal appropriation. After settling a controversy, the Court **appends** its order to the final decree (MCA § 85-2-406(3)).

During the Permit Process. During the hearing stage of either: (1) a proposed water permit or (2) a proposed change in a water permit, interested persons may voice objections before DNRC. The Department may invite the Water Court to rule on any legal issues raised by an objection, incorporating the court's ruling into the final permit decision (MCA § 85-2-309(2)).

Undoubtedly, water rights litigation is not a casual undertaking. Participants generally must hire an attorney, prepare formal documents, and conduct extensive background research to defend their position. It is common for a case to span several years, requiring substantial funding.

Mediation

A growing alternative to litigation is dispute **mediation**. While not used as frequently as litigation, this informal process is typically less costly and time-consuming. Participants also play a more direct role in defining the outcome. The supervising district judge can appoint a water mediator to negotiate a controversy by:

- request of the governor;
- petition of water rights holders (owning at least 15 percent of the water rights on a watercourse); or
- discretion of the court (MCA § 85-5-110).

A water mediator conducts on-site visits, meets with principal parties, and holds public meetings to work toward an agreeable solution. Appropriators can either accept a mediator's final recommendation or, if still unsatisfied, seek litigation.

HOW ARE WATER RIGHTS ENFORCED?

No person may waste water, use water without authorization, prevent water from reaching a prior appropriator, or otherwise violate water use laws (MCA § 85-2-114(1)). Statewide monitoring and enforcement encourage the proper use of Montana waters.

DEPARTMENTAL SUPERVISION

DNRC supervises water use to ensure compliance with permits and laws. Among its powers, the Department may:

- require appropriators to install and maintain measuring/control devices to meter water use;
- require appropriators to record and report measurements; and
- inspect diversions and water use locations (MCA § 85-2-113, 115).

If DNRC determines a person is violating water use law, Department staff must attempt to obtain ***voluntary*** compliance through warning and assistance. If unsuccessful after three working days, the Department may petition the supervising district court to take action (MCA § 85-2-114(4)).

Water Measurement Program

DNRC also administers a water measurement program to alleviate **chronically dewatered streams** and accompanying conflicts among rights holders. On such streams, appropriators must typically install measuring/control devices to regulate diversions (MCA § 85-2-113(4)). In identifying dewatered areas, the Department considers:

- extent, duration, and frequency of dewatering;
- impact of dewatering on wildlife and habitat;
- impact on off-stream uses like agriculture, industry, municipalities, and recreation;
- existence of adjudicated decrees;
- history of conflict among water rights holders on a watercourse;
- practicality of installing measuring/control devices on a watercourse; and
- likelihood that measuring/control devices will alleviate dewatering or conflict (MCA § 85-2-150).

JUDICIAL ENFORCEMENT

Each Montana district court enforces water use within its **jurisdiction** (MCA § 85-5-106). As court appointees, water commissioners can arrest any person interfering with water distribution (MCA § 85-5-108). Upon petition by DNRC, a district court may also:

- regulate the measuring/control devices of an appropriation to prevent wasteful or unlawful use; or
- issue an **injunction**, ordering a violator to: (1) cease and desist unlawful use and (2) take steps to remedy the violation (MCA § 85-2-114).

Penalties. Anyone breaking water use law is guilty of a **misdemeanor** in addition to being subject to civil penalty of up to $1,000 per violation. Each day of violation is a separate violation. A senior water right holder also may bring a civil action to enjoin and seek damages from a junior water right holder who interferes with the senior's use of water (MCA § 85-2-122).

GOVERNMENT AND WATER

Every level of government plays a vital role in water use. While state government constitutes the driving force behind Montana water rights, the federal government regulates and manages numerous national projects throughout the region. At the community level, local government coordinates water use to meet unique area needs.

WHAT ROLE DOES STATE AND LOCAL GOVERNMENT PLAY IN MONTANA WATER USE?

FEDERAL POWERS

Although not explicitly mentioning water, the U.S. Constitution implies federal authority to manage our nation's waterways. This authority takes form through several powers:

- **Commerce Power** — jurisdiction over all navigable waters;
- **Proprietary Power** — authority to control federal public lands and the water projects thereon;
- **Treaty-making Power** — authority to form treaties with foreign nations and Indian tribes;
- **General Welfare Power** — authority to provide for the common good of all U.S. citizens;
- **Equitable Apportionment** — authority to decide water controversies among states; and
- **Interstate Compacts** — final approval on all interstate water agreements.

In Montana, federal agencies regulate a variety of national projects, including: dams, irrigation districts, and wildlife refuges. Most significantly, the federal government develops reserved water rights for Indian reservations and national public lands.

FEDERAL RESERVED WATER RIGHTS

The reserved water rights doctrine assures that federally established lands have adequate water to fulfill their designated purpose. This federal doctrine originated in the U.S. Supreme Court decision of *Winters v. United States* (1908) (207 U.S. 564).

Remarkably, this nationally significant case sprang from Montana waters — tribes on the Fort Belknap Reservation and non-Indian settlers were clashing over use of the Milk River. Several irrigators upstream of the reservation were diverting water onto their homesteads, leaving little water for the Indians downstream. On behalf of the tribes, the United States sued the settlers for relief.

Implied Rights. The Supreme Court held that when Congress or the President reserves land for a specific purpose, water rights are also reserved to fulfill the specific purpose. These implied rights exist regardless of their use or non-use. Thus, the court reasoned that the federal government would not authorize reservation land unless water was available to make the lands livable (207 U.S. 564, 577).

Priority at Creation. Additionally, the court ruled that the priority of a reserved right dates back to designation of the land (207 U.S. 564, 577). Since Congress ratified the creation of the Fort Belknap Reservation on May 1, 1888, tribal rights bear that date. The earliest settler appropriation was in 1898. In conclusion, the irrigators were appropriating out of order, denying the reservation's senior rights.

Often termed the "Winters Doctrine," the reserved rights doctrine extends to federal public land nationwide. In Montana, areas with reserved rights include: seven Indian reservations, national forests and refuges, national parks and monuments, wild and scenic rivers, and Bureau of Land Management (BLM) lands.

Quantification

Although reserved water rights commenced at the turn of the century, their **quantification** lagged by more than fifty years. Not until 1963, in *Arizona v. California* (373 U.S. 546), did reserved rights receive a fixed quantity. The U.S. Supreme Court, in resolving interstate water disputes on the Colorado River, assigned specific volumes to the Indian reservations and federal lands involved.

Reserved Water Rights Compact Commission

Anticipating quantification in its own state, the 1979 Montana Legislature created the Reserved Water Rights Compact Commission (RWRCC) to negotiate reserved water rights compacts.

Depending on the negotiating entities, compacts follow different processes. Typically, the agreement must be signed by all parties → passed through the Montana Legislature → and either: (1) ratified by U.S. Congress or (2) approved by the Department of Justice (DOJ). Finally, the Water Court integrates the ratified/approved compact into the final decree of the affected basin (MCA § 85-2-234(2)).

Montana signed its first compact with the Fort Peck Indian Reservation in 1985. Since then, other tribes and federal agencies have followed suit. Once finalized, these rights bear definite quantities, beneficial uses, and times of use — much like traditional appropriation rights.

MONTANA COMPACT	AFFECTED AREAS	STATUS
Assiniboine and Sioux Tribes	Fort Peck Indian Reservation	Congressional ratification in 1985
Northern Cheyenne Tribe	Northern Cheyenne Indian Reservation	Congressional ratification in 1992
National Park Service	Yellowstone Park, Glacier Park, Big Hole Battlefield, Little Bighorn Battlefield National Monument, and Bighorn Canyon Recreation Area	Congressional ratification in 1993 through 1995
U.S. Fish and Wildlife Service	Benton Lake National Wildlife Refuge, Black Coulee NWR, Bowdoin NWR, Charles M. Russell/UL Bend NWR, Red Rock Lakes NWR, and National Bison Range	at various stages ranging from negotiation to pending DOJ approval
U.S. Bureau of Land Management	Bear Trap Canyon Public Recreation Site and Missouri Wild and Scenic River	pending DOJ approval
Chippewa Cree Tribe	Rocky Boy Indian Reservation	pending Congressional ratification

WHAT ROLE DOES STATE AND LOCAL GOVERNMENT PLAY IN MONTANA WATER USE?

The uses of Montana waters continue to diversify. Where mining and irrigation once dominated the appropriation scene, they now share the stage with municipal use, power production, industrial processes, recreation, and instream flows. To remain responsive to evolving state and local needs, water use laws must accommodate these increasingly varied interests.

WATER RESERVATIONS

The Montana Legislature was planning ahead when it introduced a water reservation system in 1973. Prevalent natural resources development, improved irrigation technologies, and anticipated population growth were a few of the motivating factors. Essentially, the state created a "set aside" mechanism for entities to reserve unappropriated waters for future demands.

Participation. A component of the **Water Use Act** (WUA), the water reservation system is accessible only to state or federal government agencies/subdivisions. Additionally, the reservation of Montana waters is limited to:

- existing or future beneficial uses;
- maintaining a minimal flow/level of water; or
- maintaining minimal quality of water (MCA § 85-2-316(1)).

Criteria. Like permitted rights, water reservations require DNRC review and approval. The applicant must provide evidence of:

- the purpose of the reservation;
- the need for the reservation;
- the amount of water necessary for the reservation; and
- that the reservation is in the public interest (MCA § 85-2-316(3)-(4)).

Montana's first approved water reservations occurred on the Yellowstone River in December 1978. The Department of Health (now the Department of Environmental Quality(DEQ)) requested reservations to maintain water quality. The Department of Fish, Wildlife, and Parks (FWP) sought reservations to maintain stream flows. Meanwhile, municipalities like the city of Billings wanted water for future growth. In total, the state granted reservations to: eight municipalities; fourteen **conservation districts**; two irrigation districts; four state agencies; and two federal agencies. Similar reservations have followed on the upper and lower Missouri River Basins.

INSTREAM FLOW

Historically, Montana water rights have involved **consumptive uses**. Over time, the public is also recognizing the importance of **instream flows** -- particularly in promoting water quality, fish and wildlife habit, and recreation. Consequently, federal and state governments are redefining water law to encompass increasing ***non***consumptive uses.

Federal Designations

Reserved Water Rights. On national public lands, the federal government claims reserved water rights for maintaining necessary instream flows. Particularly in parks and refuges, minimum water levels are critical to habitat protection.

Wild and Scenic Rivers. Additionally, under the federal **Wild and Scenic Rivers Act**, U.S. Congress or state legislatures may designate rivers containing "remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values" (16 U.S.C.A. §§ 1271-87). Once establishing a "wild and scenic" river, state or national government can restrict impoundments and other projects potentially affecting water flow.

State Designations

Murphy Rights. From 1969-1973, the Montana Legislature allowed the Fish and Game Commission to claim unappropriated waters for maintaining fish habitat. Known as "Murphy Rights" (after the sponsoring legislator), these instream flow rights exist on twelve state watercourses.

Water Reservations. Water reservations comprise the majority of Montana's instream flow rights. Set aside by both FWP and DEQ, these nonconsumptive holdings reach more than 300 streams across the state.

Change of Use/Leasing. In 1995, the state legislature began allowing appropriators to ***temporarily*** change their water rights for instream flow use. With DNRC consent, rights holders may forego traditional diversions to enhance fish habitat (MCA § 85-2-408). Appropriators may also lease their water rights to FWP through a similar process (MCA § 85-2-436).

Case Studies. To better understand the social, economic, and environmental ramifications of nonconsumptive uses, the state has initiated instream flow studies. In the Upper Clark Fork River Basin, a pilot program -- scheduled for completion in 2004 -- is examining the change of use/leasing of instream flows and its impacts on that community (MCA § 85-2-439). Another statewide study is tracking the progress of water leasing by FWP (MCA § 85-2-436).

Although water reservations and instream flows are new participants in the prior appropriation system, they must follow the longstanding rule: first in time, first in right. Appearing much later than existing rights, these uses are often junior in priority. Thus, Montana water law continues to honor and protect traditional rights, while creating space for evolving water uses.

CONCLUSION

From yesterday's colorful mining camps to today's blue ribbon trout streams, water rights weave through the lives and activities of all Montanans. Federal water law and policy imposes only a minimum of uniformity - each state has developed water law regulations that are uniquely its own. Whatever the future of water use, Montana's water rights will bear the distinct mark of its citizens.

GLOSSARY OF TERMS

abandonment — intentional, prolonged nonuse of a water right, resulting in its loss.

acre-foot — the volume of water that will cover one acre to a depth of one foot.

adjudication — a judicial procedure decreeing the quantity and priority date of all existing water rights in a basin.

Administrative Rules of Montana (ARM) — a collection of state agency rules used in the implementation of federal and state codes.

adverse — unfavorable.

appeal — to move a case from a lower to a higher court to review the lower courts decision.

append — to add or attach.

appropriate — to capture, impound, or divert water from its natural course and apply toward a beneficial use.

basin — the area drained by a river and its tributaries; a watershed.

beneficial use — a condition applied to the use of prior appropriation water right, commonly including: agricultural, domestic, municipal, industrial, recreational, fish/wildlife, and water leasing purposes.

biennium — a two-year period.

chronically dewatered stream — a stream where diversion frequently depletes much of the water.

claim — an assertion that a water right exists, usually occurring during the adjudication process.

claimant — person filing a claim.

common law — all the statutes and case law of England before the American Revolution.

compact — a legal agreement between Montana and (1) a federal agency and/or (2) an Indian tribe determining the distribution of federally and/or tribally claimed water rights.

compliance — obeying and achieving the conditions of a rule, permit, order, or law.

conservation district — a political subdivision of state government, possessing both public and private attributes, that is primarily concerned with the conservation of water and soil.

constitution — the highest form of state law, agreed upon by the people of the state, establishing the fundamental character and conception of state government.

consumptive use — a beneficial use of water that reduces supply, such as irrigation or municipal use.

contiguous — next to; adjoining.

cubic foot per second (cfs) — a rate of water flow that will supply one cubic foot of water in one second.

decreed water right — a water right issued by the court upon adjudication of a stream.

degradation — a lowering of water quality.

diggings — a site of mining or other excavation.

diminution — a decrease in quantity.

discharge permit — an authorization from the Montana Department of Environmental Quality that allows the discharge of waste within specific parameters.

district — one of the judicial areas into which a state is divided; each district has a district court presided by a district judge.

diversion — an open, physical alteration of a stream's flow away from its natural course.

due diligence — steadily working toward completion within a reasonable period.

effluent — an outflow of waste.

exemption — freedom from a rule or obligation that applies to others.

existing right — a Montana water right originating on or before July 1, 1973; subject to adjudication.

flow rate — that rate at which water is diverted from a source.

forfeit — to lose the right to use without regard to intent to give up that right.

ground water — any water beneath the land surface, bed of a stream, lake, or reservoir.

ground water area — an area enclosing a single, distinct body of ground water.

hybrid — a combination of riparian and appropriation doctrines.

impound — to gather and enclose, as in a reservoir.

injunction — a court order prohibiting a specific act or commanding the undoing of some wrong or injury.

instream flow — water left in a stream for nonconsumptive uses like recreation or preservation of wildlife habitat.

interested persons — persons with a real property interest, water right, or other economic interest that may be directly affected.

irrigation district — a subdivision of government, managed by a board of directors, that supplies water to irrigators within a specified region.

junior appropriator — a secondary user on a watercourse, holding a water right inferior to previous (senior) users.

jurisdiction — the area of law over which a court has authority.

litigation — a lawsuit or other legal action.

mediation — a private, informal dispute resolution process where a neutral third party guides negotiation of a solution.

miner's inch — by Montana law, 1 cfs≈40 miner's inches.

misdemeanor — an offense punishable by fine, penalty, or imprisonment in a county jail for less than 1 year.

Montana Codes Annotated (MCA) — the collection of Montana statutes classified by subject.

Montana Reports (Mont.) — a published record of all Montana Supreme Court decisions.

nonperennial stream — a stream that does not flow continuously year round during wet years as well as dry years.

oversight — watchful care, supervision.

perfected water right — a valid water right, exhibiting intent→diversion→beneficial use; once perfected, a right receives a priority date and becomes legally absolute but subject to abandonment or forfeiture.

permit — an authorization to use water, issued by the state, specifying conditions like type, quantity, time, and location of use.

precedent — a course of action that serves as an example for a later one.

preponderance of evidence — convincing evidence that shows the facts are more probable than not.

priority date — the official date of an appropriation, generally the date of established intent; used in determining seniority among water users.

provisional — temporary.

quantify — to determine of the volume of a water right, typically expressed in acre-feet and/or flow rate, typically expressed in cubic-feet per second.

reasonable use — a condition applied to the use of riparian water rights, determined in comparison to the uses of other riparians on the same watercourse.

recharge — the resupply of water to rivers or aquifers.

remand — to send back with instructions for further proceedings.

Federal reserved water right — a special water right accompanying federal lands or Indian reservations, holding a priority date originating with the creation of the land.

riparian — bordering a water body.

salvage — water made available through water-saving methods.

senior appropriator — an original user on a watercourse, holding a water right superior to all subsequent (junior) users. The term is also used in a conflict between junior users to describe the junior user with the best, or earliest, priority date.

surface water — water above the land surface, including lakes, rivers, streams, wetlands, wastewater, flood water, and ponds.

United States Supreme Court Reports (U.S.) — a published record of all U.S. Supreme Court decisions.

valid — recognized by law; legal and enforceable.

volume — amount of water diverted over a specific period of time.

water master — an attorney versed in water law who serves at the discretion of the Water Court.

water quality — chemical, physical, and biological characteristics of water that determine its suitability for a particular use.

water reservation — a water right reserved by a government entity for future use or instream flow.

watercourse — any naturally occurring stream or river, not including ditches, culverts, or other manmade waterways.

watershed — a geographic area that includes all land and water in a drainage system.

INFORMATION RESOURCES

Department of the Interior
Bureau of Indian Affairs, Bureau of Reclamation, National Park Service, U.S. Fish and Wildlife Service
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Washington, D.C. 20240
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Department of Environmental Quality (DEQ)
P.O. Box 200901, Helena, MT 59620-0901
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http://deq.mt.gov/

Department of Fish, Wildlife, and Parks
P.O. Box 200701, Helena, MT 59620-0701
Ph: 406/444-3186, F: 406/444-4952, E-mail: pgraham@mt.gov
http://www.fwp.mt.gov/

Department of Natural Resources and Conservation (DNRC)
P.O. Box 201601, Helena, MT 59620
Ph: 406/444-2074, F: 406/444-2684

Legislative Environmental Policy Office (LEPO)
Environmental Quality Council
P.O. Box 201704, Helena, MT 59620-1704
Ph: 406/444-3742, F: 406/444-3971, E-mail: teverts@mt.gov

Montana Water Court
P.O. Box 879, Bozeman, MT 59771-0879
Ph: 800/624-3270, F: 406/586-4374

Montana State Law Library
Justice/State Library Bldg., Box 203004, Helena 59620-3004
Ph: 406/444-3660, F: 406/444-3603, E-mail: jmeadows@mt.gov
http://161.7.121.6/

Montana university system Water Center
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Reserved Water Rights Compact Commission (RWRCC)
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